BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of the Local Competition Provisions in The Telecommunications Act of 1996	CC Docket No. 96-98

INITIAL COMMENTS OF NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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In the Matter of

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EXECUTIVE SUMMARY

NARUC believes that Federal-State cooperation is essential to ensure that federal and state policies work in concert to bring the benefits of competition to all markets and subscribers. These comments outline NARUC's suggestions for achieving the federal and state balance needed to expedite realization of Congress' goals.

Specifically, NARUC suggests

- The States are unequivocally committed to local competition and implementing the pro-competitive goals of the Act. It must be recognized that the level of intrastate competition experience in each jurisdiction, is due in part to competitors' focus on the most attractive markets.

- NARUC and the individual States have devoted considerable resources to assist the FCC efforts to implement the Act in a manner that does not impede, or duplicate, existing State and Federal pro-competitive initiatives, or result in unnecessary litigation. A Federal-State partnership is necessary to ensure the rapid development of local competition.

- NARUC pledges its continued support to this cooperative effort. Federal and State policies must work in concert to bring the benefits of competition to the nation's consumers.

- NARUC believes that some of the FCC tentative conclusions in this rulemaking will impede, not promote the swift transition to a more competitive environment sought in the legislation.

- The '96 Act clearly preserves State authority under § 152(b). National policies must be crafted which recognize that clear Congressional grant of authority to the States. The FCC's conclusions aside, by its own terms, § 152(b) applies to all of Part II of Title II, including § 251, § 252, and § 253.

EXECUTIVE SUMMARY

(Continued)

- Moreover, application of § 152(b) & § 610, inter alia, requires a narrow reading of the FCC's authority under § 251 & § 253 to promulgate preemptive rules. Specifically, the FCC has authority to address only those "implementing regulations" expressly designated in § 251.

- An examination of the text of the statute also makes it clear the FCC lacks authority to impose pricing standards binding on the States.

- There are several places in the legislation where both the need for, and the authority to promulgate, general national guidelines are present, e.g., numbering portability, numbering administration, etc.

- In those circumstances, we urge the FCC to assure States retain the flexibility to address local market conditions and costing structures.

- Finally, there are several issues raised in this proceeding that require referral to a Federal-State Joint board as soon as is practicable.

NARUC looks forward to continuing cooperative efforts to implement the 1996 Act. There are a number of issues raised by the NPRM that should be the focus of additional Federal-State discussions. In the interim, the States will continue to move forward to implement pro-competitive goals of the Act. Continued discussions on issues of mutual concern will facilitate these efforts.

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Pursuant to the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. §§ 1.49, 1.415, and 1.419 (1995), the National Association of Regulatory Utility Commissioners ("NARUC")[1] files these comments addressing the "Notice of Proposed Rulemaking" ("*NPRM*") adopted in the above captioned proceeding April 19, 1996 [FCC 96-182].

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[1] NARUC is a quasi-governmental nonprofit organization founded in 1889 to, inter alia, improve the quality and effectiveness of public utility regulation. Members include the commissions from all States, the District of Columbia, Puerto Rico, and the Virgin Islands, that regulate, inter alia, intrastate telecommunications services. NARUC also (i) nominates state members to the 47 U.S.C. § 410 mandated Federal-State Joint Boards, (ii) actively represents State interests in FCC dockets that impact state regulatory initiatives, and (iii) collaborates with the FCC Common Carrier Bureau in matters of common interest. [47 C.F.R. § 0.91(c) states the CCB is to "[c]ollaborate with..state [PUCs].. and [NARUC] in...studies of common carrier and related matters."

I. INTRODUCTION

Passage of the "Telecommunications Act of 1996" ("Act" or "'96 Act"),[2] the first comprehensive reform of federal communications law in over 60 years, was a landmark event. This legislation establishes a framework for Federal and State cooperation to facilitate the transition to competition throughout the communications industry. Throughout the legislative process, NARUC strongly supported removal of barriers to competitive entry and apprised Congress of ongoing State initiatives to bring the benefits of competition to local exchange subscribers.

NARUC's primary focus remains protecting consumers while facilitating the transition to competition. The Act clearly defines roles for both Federal and State regulators explicitly based on the fundamental division of authority enunciated in § 152(b). This new framework reflects Congress' decision to leave direct oversight of intrastate markets to the States as the most expedient way to both assure the development of genuine local exchange competition and ensure consumers are protected.

NARUC believes that Federal-State cooperation is essential to ensure that federal and state policies work in concert to bring the benefits of competition to all markets and subscribers. These comments outline NARUC's suggestions for achieving the federal and state balance needed to expedite realization of Congress' goals.

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[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 State. 56 (1996) (to be codified at 47 U.S.C. §§ 151 et seq.)

As mentioned previously, several States, with a wide variety of demographic and geographic characteristics, have initiated actions to create a climate which encourages local entry by alternative providers. The disparity among States in the level of intrastate competition is due in part to competitors' focus on the most attractive markets, not State resistance to competitive entry. The industry's focus on the more lucrative metropolitan areas is understandable. However, this industry focus skews the statistics regarding related State initiatives to foster local exchange competition, particularly for rural States. Examples cited within the following comments attest to the need for state flexibility to develop policies which are consistent with the Act, yet accommodate local market conditions.

NARUC looks forward to continuing cooperative efforts to implement the 1996 Act. There are a number of issues raised by the NPRM that should be the focus of additional Federal-State discussions. In the interim, the States will continue to move forward to implement pro-competitive goals of the Act. Continued discussions on issues of mutual concern will facilitate these efforts.

II. ARGUMENT

A. THE PROPER SCOPE OF THE FCC INTERCONNECTION RULES.

1. A Coordinated FCC-State Approach to Implementing § 251-2 is Required.

NARUC shares the FCC's belief that a coordinated Federal-State approach is required to assure a smooth implementation of the Act.[3] We recognize that the Act provides a "..legitimate FCC role to prescribe [certain] policies..[which are]..cognizant of local policies and concerns."[4] However, particularly with regard to the local competition issues implicit in § 251, application of the following precepts is critical:

- Broad *general* national principles should be articulated only where required. A one-size-fits-all policy should be avoided to (a) ensure competition develops expeditiously in all markets, (b) avoid regulatory gridlock, and (c) minimize unnecessary litigation.

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[3] **See**, "*The Telecommunications Act of 1996: Evolution not Revolution*," Speech of FCC Chairman Reed Hundt (As prepared for delivery), Presented by FCC Chief Economist Farrell in place of the Chairman, May 10, 1996 to Northwestern University in Chicago, Illinois. There, mimeo at 2, the Chairman notes: "It is important to remember that the task of finding solutions that promote competition, keeping...service affordable, and making sure network providers continue to be able to fund their business will not be done by the FCC alone. We must and will work together with our state partners on all these issues to formulate answers. And there is little doubt that - as is true today -- the bulk of [phone] regulation will continue to be done at the state level." **Cf.**, the February 28, 1996 *Resolution Regarding the NARUC Policy Principles for the Implementation of the "Telecommunications Act of 1996"*, which contends that "[t]o avoid creating an opportunity for [industry] forum shopping...the FCC and the States should work together to develop policies which...allow for State creativity and innovation to facilitate competition and preserve universal service," and looks "forward to working closely with Federal policy makers to promptly...implement...this Act."

[4] *Resolution Regarding the NARUC Policy Principles for the Implementation of the "Telecommunications Act of 1996"* (February 28, 1996)

- FCC policies and rules should complement, not impede or duplicate, State efforts to foster local competition. States must retain flexibility to implement competition and pricing policies consistent with local market conditions.[5]

In ¶ 26 of the NPRM the FCC states that it will pay "due regard to work already done by the states that is compatible with the [Act's]...pro-competitive intent." However, the myriad of tentative conclusions and proposals suggests the FCC is considering a detailed and very prescriptive uniform national approach intended to bind the states.[6] Moreover, in ¶¶ 37 - 39, the FCC tentatively concludes that § 152(b)'s reservation of State jurisdiction has no application to § 251 and 252.

NARUC disagrees with both of these suggestions. An examination of the history and text of the 1996 Act clearly indicates Congress' intent that -

- o the FCC take a very flexible and general approach to any implementing rules, and, that -
- o § 152(b) apply to all of Part II of Title II, including §§ 251, 252, and 253, and restrict the FCC's authority to take action under those provisions.

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[5] Id.

[6] Indeed, in ¶ 5 & ¶ 22, the FCC establishes the premise for the NPRM's repeated requests for examples where existing State practices are "not consistent with the Act" or "bad policy." In those paragraphs it suggests the FCC's § 251 rules "...should help..give..meaning to what state..requirements the [FCC] 'shall preempt' as barriers to entry pursuant to § 253."

2. The detailed prescriptive Federal overlay suggested by the NPRM is not supported by the text and history of the Act, and is inappropriate from a policy perspective.

a. The text and history of the Statute supports a broad approach to discrete subsections of § 251 not detailed prescriptive Federal rules.

(1) The (1) the abbreviated time frame specified, (2) Statutory outline for coordinated FCC-State action, and (3) choice for State monitored negotiations as the primary conduit for interconnection agreements, are clear evidence of Congressional intent that any FCC rules be broadly drafted.

As the discussed, infra, the NPRM raises a broad range of topics including some, e.g., § 252 pricing issues, that are technically complex and not readily susceptible to easy solutions. As discussed in more detail, infra, the time pressures imposed by Congress, from a policy perspective, weigh against precipitous FCC action providing detailed rules in many of these areas.

However, the short time frame imposed is also evidence that Congress never intended for the FCC to engage in a very detailed undertaking. Congress knows how the FCC operates and the typical timeframes for proceedings. When it specified the time frame for the interconnection proceeding, Congress also was aware that the Act would, at least in the near term, impose significant additional burdens upon the FCC limited resources and that six months is barely enough time to complete a single round of comments.

That fact alone strongly suggests that Congress expected the FCC to stick to the broad statements of the Statute and only address the subparts of § 251 that specify implementing rules. Indeed, at least one Senator has claimed that Congress already has done "the heavy lifting" in making tough policy choices.

A detailed approach also ignores the structure for Federal-State action outlined in the Statute.[7] Any review of § 252 and § 251 must concede the following:

(1) that Congress chose negotiation, not FCC regulations, as the primary mover for interconnection arrangements, and the States, not the FCC, as the initial arbiter and overseer of such efforts,

(2) that those negotiations were to take place against the backdrop of existing State access and interconnection regulation grandfathered under § 251, and express State authority to impose additional conditions, and

(3) the FCC is given express authority to act, but only if the State fails to act.

The enactment of detailed Federal guidelines cuts against Congress's express choice for State monitored negotiation as the moving force for § 252 interconnection arrangements. The more detail that is provided, the less need for negotiation.

Moreover, such detailed guidelines could well make it more difficult for "niche" service providers to negotiate the arrangements they need to succeed.

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[7] In ¶ 38 of the NPRM, the FCC notes that "[b]ecause the statute explicitly contemplates that the states are to follow the Commission's rules, and because the Commission is required to assume the state commission's responsibilities if the state commission fails to act to carry out its...responsibilities, we believe that the jurisdictional role of each must be parallel." Standing alone, this statement is ambiguous. However, when read in tandem with the detailed federal overlay suggested by the remainder of the NPRM, the term "parallel" suggests the FCC has been given the authority to mandate the appropriate detailed procedures for the States to follow. This notion conflicts with the structure for State and Federal interaction in the Act.

In the move to a more competitive environment, there will undoubtedly be many such "niche" operators providing individual services and combinations of services unlike the traditional and mainstream providers. The interconnection needs of such operators will vary significantly from other CLECs. In addition, prescriptive standards fail to recognize that even the mainstream competitors may, over time, alter their desired options for interconnection based on their own and/or others' experiences. National standards should be minimal to allow negotiations to foster creativity and innovation. Such innovation is critical in allowing the new entrants to tailor their networks to enable them to best serve their intended market.

Also, as discussed in more detail below, NARUC, and others, insured that Congress knew of State local competition initiatives. It is not coincidental that (1) virtually all of the existing State efforts can claim overall compliance with the general standards of the Statute, or that (2) Congress expressly grandfathered existing State "dialing parity" initiatives", and more broadly "access and interconnection" rules that "are consistent" with the statute. It is also significant that this reservation is not limited to existing regulation.

These reservations suggest that any FCC rules must be limited to assure that any pro-competitive State initiatives falling fairly within the broad terms of the Statute are allowed to continue.

The short time frame for FCC action on a wide range of issues, the express reservation of state authority to enforce existing and future access rules, the clear preference for State-monitored negotiations as the primary conduit for interconnection, and the express requirement for the FCC to act, only if the state does not, support NARUC's contention: Congress did not intend for the FCC to promulgate detailed rules in this proceeding.

A careful examination of specific provisions of the Statute lends further support to NARUC's Position.

(2) The specific terms of the Statute buttress this view of Congressional intent by placing express limitations on the FCC's authority.

(a) § 152(b) applies to § 251, § 252, and § 253.

Section 152(b) of the Communications Act of 1934, which was unchanged by the '96 Act amendments, expressly reserves state jurisdiction over intrastate wire or radio communications. It states that "Except as provided in sections 223 through 227 of this title inclusive, and section 332..., nothing..shall be construed to apply or to give the Commission jurisdiction with respect to ...charges, classifications, practices services, facilities or regulations for or in connection with intrastate communications service by wire or radio of any carrier..."(Emphasis added.).

In ¶ 39 of the NPRM, the FCC finds, with respect to its conclusion that FCC and State regulations must be "parallel", that "Section 2(b) of the 1934 Act does not require a contrary tentative conclusion."

Specifically, the FCC notes that "In enacting [§] 251 after [§] 2(b) and squarely addressing therein the issues before us, we believe Congress intended for [§] 251 to take precedence over any contrary implications based on [§] 2(b)."

This conclusion is difficult to square with both the express terms of the Statute and the legislative history.

The text of § 152(b) expressly enumerates the provisions that condition its application. As the FCC acknowledges in ¶ 39, § 251 and § 252 are not among the listed exceptions. Thus, by its own terms, § 152(b) does apply to § 251 and 252.

Moreover, the pre-conference House and Senate versions of this bill did amend § 152(b) to include express exemptions for all the analogs to the current Title II in those bills, including the provisions corresponding to § 251 and § 252 [and § 253].[8]

NARUC lobbied successfully for the removal of those provisions.[9] That decision amounts to a reaffirmation of the dual system of communication service regulation required by § 152(b).

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[8] The House Bill [HR 1555] as passed required that "[§]2(b)... is amended by inserting "part II of Title II" after "227, inclusive," See, Cong. Rec., August 4, 1995, at H 8431; S. 652 's § 101(c)(2) originally required the insertion of "section 214(d)" and "part II of Title II" as exceptions. Note, the FCC does not claim 2(b) has no application to § 253. NPRM at ¶ xx.

[9] Compare, Russello v. U.S., 464 US 16, 104 S.Ct 296, 78 L 2nd 17 (1989), where the Court found that where Congress includes limiting language in a draft bill but deletes it prior to enactment, it is presumed the limitation is not intended.

(b) § 152(b), § 601, § 251(d)(3) and related jurisprudence require the FCC's role prescribing rules under § 251 and related sections to be narrowly construed.

Sections 251 and 252 are designed to, inter alia, open up local exchange markets to competition. This is historically an area that has been the exclusive domain of the States. Any assignments of rulemaking responsibilities to the FCC in § 251, insofar as it is binding upon the States, is in conflict with § 152(b).

As the Supreme Court explains in Louisiana Public Service Commission vs. FCC, 106 S Ct at 1899, 1902 n.5, 1903, the statement of policy embodied in § 152(b) not only "impose[s] jurisdictional limits on the power of" the FCC, but also "provides its own rule of statutory construction" for interpreting the Act.

As a threshold matter, the Supreme Court has determined, in Louisiana and elsewhere, that exceptions to general statements of policy should be narrowly construed to preserve the primary operation of that policy.[10]

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[10] Cf. generally, Commissioner v. Clark, 489 U.S. 726, 109 S.Ct. 1455, 103 L.Ed 2d 753 (1989). In Louisiana, 476 US 355 (1986), the United States Supreme Court stated, in relevant part: "[T]he best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency. Section 152(b) constitutes, as we have explained above, a congressional denial of power to the FCC to require state commissions to follow FCC depreciation practices for intrastate ratemaking purposes. Thus, we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.

Moreover, we reject the intimation, the position is not strongly pressed, that the FCC cannot help but preempt state

Thus, any FCC prescriptive FCC rules pursuant to § 251 should be narrowly construed to preserve the primary thrust of § 152(b).

A related rule of statutory construction is the well established "presumption against finding preemption of State law in areas traditionally regulated by the States." See, California v. ARC America Corp., 490 U.S. 91, 101 (1989). States have regulated all aspects of local telephone service since 1910. Again, if Congress had intended, in § 251, to preempt such regulation, it will have expressly so stated. Cf. Hillsbourough County v. Automated Medical Laboratories, 471 U.S. 707, 175 (1985).

Certainly, in other sections of the Act, Congress did not exhibit such reticence. For example, new § 276 also deals with a regulatory arena that historically has been predominately a State problem. There Congress not only specifically referenced "intrastate and interstate" matters, but also stated that "to the extent that any State requirements are inconsistent with the Commissions regulations, the Commissions regulations on such matters shall preempt such State requirements." Again, in § 205, Congress, in the same Act, gives the FCC "exclusive jurisdiction" over certain aspects of Direct-to-home Satellite services.

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depreciation regulation of joint plant if it is to fulfill its statutory obligation and determine depreciation for plant used to provide interstate service, i.e., that it makes no sense within the context of the Act to depreciate one piece of property two ways. The Communications Act not only establishes dual state and federal regulation of telephone service; it also recognizes that jurisdictional tensions may arise as a result of the fact that interstate and intrastate service are provided by a single integrated system." 476 US at 374-375 (emphasis in original).

Both the express text of § 152(b) and these related rules of statutory construction require the scope of any FCC's prescriptive authority under § 251 to be narrowly construed.

This conclusion is further buttressed by § 601(c)(1) and § 251(d)(3) of the Act. Both sections clearly illustrate Congress' intent that only the FCC only take broad action in the limited areas specified under § 251. Section 601, in the section entitled "Effect on Other Laws", states "[t]his Act and the amendments made by this Act shall not be used to modify, impair or supersede or authorize the modification, impairment, or supersede Federal, State, or local law unless *expressly so provided* in such acts or amendment." {Emphasis added}[11]

Preemption by implication results when state law "is in actual conflict with federal law."[12] Such implied preemption can only occur in one of two ways: (1) "where it is impossible for a private party to co ply with both state and federal requirements, " or (2) " where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. In enacting § 601(c)(1), Congress explicitly stated that preemption can not result from any such finding of implied conflict.

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[11] See also Joint Explanatory Statement of the Committee of Conference ("Joint Explanatory Statement"), at 85 ("This provision prevents affected parties from asserting that the bill impliedly preempts other laws.")

[12] Freightliner Corporation v. Myrick, 115 S.Ct. 1483, 1487.

With that statement as a backdrop, it is hard to reconcile detailed and prescriptive § 251 rules with the express reservation of State authority over § 251 issues found in § 251(d)(3). That section preserves State commission regulations, policies and orders that: (a) establish access and interconnection obligations of local exchange carriers, (b) are consistent with the requirements of [§251] and (c) do not substantially prevent implementation of the section and the purposes of this part.[13]

Based upon the foregoing sections and principles, FCC authority to implement prescriptive rules binding on the States based upon § 251 must be strictly and narrowly construed.

(c) The required narrow reading of FCC's § 251 authority limits its role to the "implementing regulations" expressly required.

The principles enunciated, supra, indicate that the FCC's § 251(d) authority to issue prescriptive "regulations to implement the requirements of [§ 251]" is limited to the express activities assigned the Commission in that section.

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[13] Significantly, unlike other sections of the '96 Act, this section does not require State regulations to be "consistent" with the FCC's regulations. Cf. 47 U.S.C. § 276. See also the more general reservations of overall State authority in § 261(a) & (b) assuring that "[n]othing in [Part II of Title II] shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part."

Specifically, the FCC is expressly given authority to prescribe numbering portability requirements,[14] to prescribe regulations for resale,[15] to determine unbundled network elements,[16] and to establish a North American Numbering plan administrator and a cost recovery mechanism for the administrators operations.[17]

Section 251 does not authorize the FCC to proscribe rules in any other area. Preemption is only permitted, under § 251(e)(5), if the States "will not act." Thus, the FCC may preempt only if a State commission fails to mediate or arbitrate agreements. Indeed, the States, not the FCC, are specifically required to implement the pricing rules set out in § 252.

The provisions of the 1996 Act must be interpreted to give effect to the system of dual state and federal regulation of telecommunications service established by § 152(b). A limitation of the FCC's authority to those subparts of § 251 granting it express authority to promulgate rules retains the Act's continued recognition of dual federal and state spheres of authority.[18]

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[14] § 251(b)(2) imposes a duty "in accordance with **requirements** imposed by the Commission." 47 U.S.C. § 251(b)(2) (1996)

[15] § 251(c)(4)(b) imposes a duty to offer resale, but allows a State commission "consistent with **regulations prescribed by the Commission under this section**" to condition the availability of certain resale services. 47 U.S.C. § 251(c)(4)(b) (1996)

[16] § 251(d)(2) sets standards for the FCC's "determination" of what network elements should be made available under (c)(3). 47 U.S.C. § 251(d)(2)(1996).

[17] § 251(e) which grants the FCC "exclusive" jurisdiction over numbering matters and requires it to take specified actions.

[18] Compare, 47 U.S.C. 254(k)'s requirements for the FCC to deal with interstate cost allocation questions concerning the costs of

(d) Under any reading of the Statute, pricing issues remain subject to State oversight.

In ¶ 177, the FCC cites § 251's "requirements regarding rates" as authority for setting pricing principles based upon § 252 language for the States to follow.

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basic service and its requirements for States to deal with intrastate allocations.

We also note the NPRM has advanced an inappropriately broad view of § 253. In ¶¶ 5 & 22, the FCC correctly states that § 253 (1) bars state rules that prohibit or have the effect of prohibiting entities from offering telecommunications services and (2) gives the FCC authority to preempt any "law or regulation" that violates that prohibition. However, those paragraphs also suggest the FCC is relying on § 253 as the basis for the multiple requests scattered throughout the NPRM for examples where existing State practices are not consistent with the Act or "bad policy." Specifically, in ¶ 22, mimeo at 9, it states "[t]he § 251 rules should help to give content and meaning to what state or local requirements the [FCC] 'shall preempt' as barriers to entry pursuant to § 253."

The use of § 253 as an independent basis for such broad ranging preemptive requests cannot be supported. As discussed in the body of these comments, § 601's express limitations on "implied" changes, in tandem with general rules of statutory construction, require that § 253 be narrowly construed. Moreover, § 253(b) expressly reserves State authority to impose "on a competitively neutral basis, and consistent with [§] 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." The bulk of existing state regulation was promulgated based upon express findings concerning this stated need to protect the public safety and welfare. That section, and the earlier discussions, infra, clarify the imperative to strictly limit and/or narrowly construe this section of the Act.

Accordingly, the § 253 prohibition of "barriers to entry" must be limited to "absolute" or "de facto" barriers, e.g., express or implied exclusive franchising requirements. Not to requirements that merely increase the cost of entry or make it more difficult. All state regulation has associated compliance costs. Accordingly, such rules will, by definition make entry potentially more expensive and perhaps more difficult. However, § 253 targets rules that "prohibit" entry. As long as rules are imposed evenly upon all potential entrants, § 253 has no application.

Specifically, the FCC cites, (1) § 251(c)(2), (c)(3), and (c)(6) requirement that incumbent LECs' "*rates*, terms and conditions" for interconnection, unbundled network elements, and collocation be "just, reasonable, and nondiscriminatory," (2) § 251(c)(4)'s requirement that incumbent LECs offer "for resale at wholesale *rates* any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers," without unreasonable conditions, and (3) § 251(b)(5) requirement that all LECs "establish reciprocal *compensation* arrangements". {Emphasis in the original.}

Based upon this recitation, the FCC then concludes, inter alia, "that this statutory language establishes our authority under [§] 251(d) to adopt pricing rules to ensure that rates for interconnection, unbundled network elements, and collocation are just, reasonable, and nondiscriminatory." The NPRM's efforts to stretch the reach of the FCC's authority is obvious. Taken in context, the emphasized sections do not confer the requisite jurisdiction. Indeed, by devoting six paragraphs, and 2 1/2 pages, to explanations purportedly supporting these tentative conclusions, the FCC has tacitly acknowledged that its authority is not readily apparent from an unbiased reading of the statutory text.

The statute simply cannot be read to allow, let alone require, the Commission to establish pricing principles for the states to apply in carrying out the states' responsibilities in arbitrating agreements. The standards for pricing in these areas are located in § 252 and require the States, not the FCC, to implement them.

Express references to States in §§ 251 and 252 and in the Joint Explanatory Statement, together with the references in § 252 to provisions of section 251, compel the conclusion that the FCC lacks authority to promulgate guidelines binding on the States.[19]

For example, the Joint Explanatory Statement states, in relevant part, that "[§] 252(c) requires a State...to ensure that any resolution of unresolved issues in a negotiation meets the requirements of [§] 251 and any regulations to implement that section. **To the extent that a State establishes the rates for specific provisions of an agreement, it must do so according to [§] 252(d).**" Joint Explanatory Statement, at 12.

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[19] Specifically, 47 U.S.C. § 252 states: (d) PRICING STANDARDS., (1) INTERCONNECTION AND NETWORK ELEMENT CHARGES. *Determinations by a state commission* of the...rate for the interconnection of facilities and equipment [referenced in § 251(c)(2)], and the...rate for network elements [referenced in § 251(c)(3)], (A) shall be, (i) based on the cost..[and] may include a reasonable profit. (2) CHARGES FOR TRANSPORT AND TERMINATION OF TRAFFIC., (A) IN GENERAL.,For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), *a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless*...(3) WHOLESALE PRICES FOR TELECOMMUNICATIONS SERVICES. For the purposes of section 251(c)(4), *a State commission shall determine wholesale rates* on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

The Joint Explanatory Statement states, in relevant part: **The wholesale rate for resold telecommunications services under new section 251(c)(4) is to be determined by the State commission on the basis of the retail rate charged to subscribers of such telecommunications services, excluding costs that will be avoided by the incumbent carrier.** Joint Explanatory Statement, at 12 (emphasis added).

It makes little sense to include this additional reference to § 252(d), if Congress expected the regulations the FCC enacts "to implement" § 251 to include § 252(d) pricing standards.

Moreover, the FCC's rationale is internally inconsistent and cuts against § 152(b) express reservation of State authority over "rates" for intrastate services. In ¶ 40 of the NPRM, mimeo at 14, the FCC unequivocally concedes that such prices will "continue to be subject to state authority." Indeed, the Commission notes that when Congress wishes to preempt State authority over end-user rates, it does it expressly, citing § 332(c) as an example. However, Commission-established prices (or pricing standards) for intrastate interconnection, services and unbundled network elements, will eviscerate State authority to realistically control retail pricing of local exchange services to end users. Thus, FCC imposed pricing guidelines would have the effect of preempting the states' pricing of intrastate services in the face of this FCC concession of State authority and the dictates of § 152(b) that "nothing" in the act will remove state authority to set intrastate rates.

The pricing principles in § 252 of the Act are unequivocally identified to guide states in their determination of rates for interconnection (including collocation), network elements, reciprocal compensation, and wholesale service offerings. This delegation by Congress is an implicit recognition of the advances already gained, as mentioned in the NPRM, by Pennsylvania, California, New York and Washington and numerous other states.

That pricing rules vary from State to State buttresses this Congressional acknowledgment that different circumstances may require different approaches, i.e., that a national "one-size-fits-all" approach is not beneficial.

NARUC agrees with the tact taken by Congress. The Commission is not given authority to dictate pricing methodologies to the states. Pricing issues are extremely complex, as LECs have different cost structures in different regions. Policies established by the FCC would not only undermine state authority, but likely prove unworkable. Indeed, the notice's prescriptive regulatory approach to pricing issues could unravel many State commission-brokered residential rate freezes and completely disrupt existing State price cap regimes.

(e) States retain authority over CMRS interconnection and unbundling either via § 252 procedures or § 332(c) "other terms and conditions" authority.

In ¶ 167 of the NPRM, the FCC concludes that CMRS providers are not obliged to provide interconnection to requesting telecommunications carriers under the provision of § 251(c)(2). In ¶ 168, the FCC finds that CEC-CMRS interconnection arrangements may nonetheless fall within the scope of section 251(c)(2) if CMRS providers are "requesting telecommunications carrier[s]" that seek interconnection for the purpose of providing "telephone exchange service and exchange access." In ¶ 169, the FCC seeks comment on the relationship of LEC-CMRS interconnection pursuant to § 332(c) and these determinations.